Office - Supreme Court, U.S.
FILED
JUL 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2166

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

ALAN B. MORRISON
(Counsel of Record)
DAVID C. VLADECK

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

DAVID K. FRANK

Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

QUESTIONS PRESENTED*

1. May a state, consistent with the First Amendment, discipline a lawyer under its anti-solicitation rules for running a truthful newspaper advertisement informing women injured by an allegedly defective medical device that it may not be too late to bring suit, offering to represent them in such litigation, and agreeing to represent approximately 100 women who contacted him in response to the ad?

2. May a state, consistent with the First Amendment, discipline a lawyer for placing an advertisement which contains an accurate drawing of an allegedly defective medical device and which states that the lawyer is available to accept cases involving that device on a contingent fee basis, on the grounds that (a) the state considers any illustration other than a picture of a lawyer or a portrayal of the scales of justice to be inherently misleading, and (b) the state contends that, in every advertisement for contingent fee representation, a lawyer must state the specific percentages to be charged and describe the manner in which costs will be handled?

3. May a state, consistent with the Due Process Clause of the Fourteenth Amendment, discipline a lawyer on the ground that he placed a misleading advertisement, where the state (a) completely changes its theory of why the ad is misleading after the trial has been concluded, and (b) bases its finding that the ad was misleading on "general knowledge which can be determined from Municipal Court reports to the [Ohio] Supreme Court," where the reports were neither introduced in evidence nor previously mentioned in the proceedings?

---

* There are no parties to this proceeding other than those listed in the caption. The Ohio Newspaper Association, the Dispatch Printing Company, and the American Civil Liberties Union Foundation of Ohio, Inc., appeared as *amicus curiae* in support of appellant in the Supreme Court of Ohio.

CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION OF THIS COURT 1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED 2
STATEMENT OF THE CASE 3
1. Statement of Facts 3
2. The Charges 6
3. The Board Decision 9
4. The Decision of the Supreme Court of Ohio 12
THE QUESTIONS PRESENTED ARE SUBSTANTIAL .. 13
A. This Appeal Presents Important Questions Under the First Amendment 14
1. The Anti-Solicitation Charges (Question 1) 15
2. The Content Restriction Charges (Question 2) .. 18
B. Appellant's Due Process Claims as to the Drunk Driving Ad Are Substantial 21
CONCLUSION 24

APPENDIX A — Opinion of the Supreme Court of Ohio in *Disciplinary Counsel v. Zauderer*, issued April 4, 1984 ..... 1a
APPENDIX B — Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, adopted June 24, 1983 ..... 8a
APPENDIX C — Order of the Ohio Supreme Court imposing public reprimand on appellant, entered April 4, 1984 ..... 22a
APPENDIX D — Notice of appeal filed in the Supreme Court of Ohio, May 31, 1984 ..... 24a
APPENDIX E — Ohio Disciplinary Rules 27a

TABLE OF AUTHORITIES

Cases: **Page**

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) ..... 4, *passim*
Bolger v. Youngs' Drug Products Corp.,
103 S.Ct. 2875 (1983) 15, 18
Cafeteria Workers v. McElroy,
367 U.S. 886 (1961) 23
Carey v. Population Services International,
431 U.S. 678 (1977) 18
Central Hudson Gas & Elec. Corp v. Public Service Comm'n,
447 U.S. 557 (1980) 14, 15, 17, 18, 20
Cole v. Arkansas,
333 U.S. 196 (1948) 22
DeJonge v. Oregon,
299 U.S. 353 (1937) 22
Durham v. Brock,
498 F. Supp. 213 (M.D. Tenn. 1980) 14
Greene v. McElroy,
360 U.S. 474 (1959) 23
In re Primus,
436 U.S. 412 (1978) 16
In re R.M.J.,
455 U.S. 191 (1982) ..... 4, *passim*
In re Ruffalo,
390 U.S. 544 (1968) 21-22
In the Matter of Disciplinary Proceedings Against Marcus,
107 Wis.2d 560,
390 N.W.2d 806 (1982) 19
Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977) 17
Matter of Discipline of Appert & Pyle,
315 N.W.2d 204 (1981) 4, 17

Page

Morgan v. United States,
304 U.S. 1 (1938) 22
Ohralik v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 11, 16, 17
Richardson v. Perales,
402 U.S. 389 (1971) 22
Spencer v. Honorable Justices of the Supreme Court of Pennsylvania
579 F. Supp. 880 (E.D.Pa. 1984) 17
State v. Schaffer,
649 P.2d 355 (Okl. 1982) 16
Thompson v. Louisville,
362 U.S. 199 (1960) 22
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 17
Wolff v. McDonnell,
418 U.S. 539 (1974) 22

Constitutional Provisions, Statutes, and Rules:

United States Constitution
First Amendment ..... 2, *passim*
Fourteenth Amendment 3, 10, 21, 23

28 U.S.C. § 1257(2) 2
28 U.S.C. § 1257(3) 2
28 U.S.C. § 2103 2
28 U.S.C. § 2403(b) 2

Rules, United States Supreme Court
28.4(c) 2
Rules of the Supreme Court of Ohio
Disciplinary Rule 2-101(A) ..... 2, *passim*
Disciplinary Rule 2-101(B) ..... 3, *passim*

Page

Disciplinary Rule 2-101(B)(15) 7, 10, 20
Disciplinary Rule 2-101(B)(16) 20
Disciplinary Rule 2-101(B)(17) 20
Disciplinary Rule 2-103(A) 3, 8, 10, 15, 16, 18
Disciplinary Rule 2-104(A) 3, 8, 11, 16, 18
Disciplinary Rule 2-106(C) 6, 7, 9, 21
Rules for the Government of the Bar, Rule V 12

Other Authorities

Wright, Miller, Cooper, & Gressman,
Federal Practice and Procedure,
§ 4016 (1977) 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PHILIP Q. ZAUDERER,

Appellant,

v.

OFFICE OF DISCIPLINARY COUNSEL
OF THE SUPREME COURT OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Ohio issued on April 4, 1984, is set forth in Appendix A (App. 1a-7a) and is reported at 10 Ohio St. 3d 44, 10 OBR 308, and 461 N.E. 2d 883. The Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, adopted on June 24, 1983, are set forth in Appendix B (App. 8a-21a) and are not officially reported.

JURISDICTION OF THIS COURT

This is an appeal from a final order disciplining a lawyer for placing two newspaper advertisements. The first two questions presented draw into question the validity of three Rules for the Government of the Bar of Ohio, issued by the Supreme Court of Ohio, including several subparts of one of

them. Appellant contends that, as applied to one of his two ads, the Rules are invalid under the First Amendment to the United States Constitution. The order of the Ohio Supreme Court imposing a public reprimand on appellant was entered on April 4, 1984 (App. C, 22a-23a) and a notice of appeal was filed on May 31, 1984, in the Supreme Court of Ohio (App. D, 24a-26a). Because 28 U.S.C. § 2403(b) may be applicable to this appeal, a copy of the notice of appeal was served on the Attorney General of Ohio. See Rule 28.4(c) of the Rules of this Court. Jurisdiction in this Court is based on 28 U.S.C. § 1257(2).

The third question presented relates to the Supreme Court of Ohio's finding of a violation of Disciplinary Rule 2-101(A) as to the other of appellant's ads. As to the finding of misconduct regarding that ad, which was also entered on April 4, 1984, appellant alleges a violation of the procedural due process protections of the Fourteenth Amendment, but does not challenge the validity of Rule 2-101(A). Accordingly, for that claim alone, this Court would have only certiorari jurisdition under 28 U.S.C. § 1257(3). However, because this Court has appellate jurisdiction under 28 U.S.C. § 1257(2) with respect to questions 1 and 2, it has appellate jurisdiction over the third question as well. *See* 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure,* § 4016 (1977) and cases cited therein.

If the Court determines that an appeal is not proper in this case, it is requested that the papers be regarded and acted on as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . .

The pertinent provisions of Rule V of the Rules for the Government of the Bar of Ohio, DR 2-101(A), DR 2-101(B), DR 2-103(A), and DR 2-104(A), are set forth in Appendix E (App. 27a-29a).

STATEMENT OF THE CASE

1. Statement of Facts

This appeal challenges the public reprimand imposed on appellant for placing two different newspaper advertisements. Because the principal focus of the disciplinary proceeding was on the ad which was placed second in time, and because the charges relating to the other ad apparently would not have caused Disciplinary Counsel to commence proceedings against appellant, we will first describe the second ad, which is the subject of questions 1 and 2.

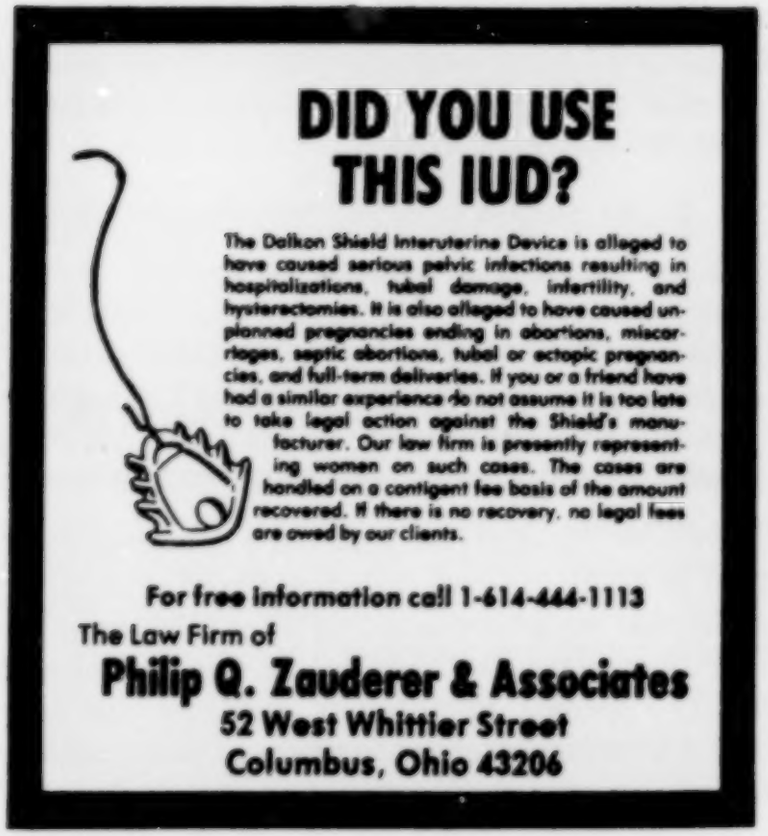
Appellant Philip Q. Zauderer has been a member of the Ohio Bar since 1964. His office is located in Columbus, Ohio, where he engages principally in plaintiffs' personal injury and product liability work. Prior to this proceeding he had no involvement with the disciplinary process.

Beginning in May, 1981, appellant wrote and met with members of the staff of the appellee Office of Disciplinary Counsel of the Supreme Court of Ohio, which is designated by that Court to enforce the attorney disciplinary rules which are embodied in Rule V of the Rules for the Government of the Ohio Bar. Appellant was interested in placing an ad similar to one which attorneys in Minnesota had run, which advised women who had utilized the Dalkon Shield as a birth control device and who had suffered injuries as a result, that it may not be too late to bring an action against the manufac-

turer of the device to recover damages for those injuries. The Minnesota ad contained a drawing of the Dalkon Shield, stated that the law firm was representing a number of women on a contingent fee basis, and gave telephone numbers and the address of the firm. Eventually, counsel for appellee advised appellant that his ad would not comply with Disciplinary Rule 2-101(B), and he did not run the ad.

Two events occurred which rekindled appellant's interest in running the Dalkon Shield ad. On December 17, 1981, the Minnesota Supreme Court in *Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204, ruled that the Dalkon Shield brochures and letters issued by those lawyers were protected by the First Amendment, and on January 25, 1982, this Court issued its opinion in *In re R.M.J.,* 455 U.S. 191, which expanded the protections previously given to lawyer advertising under the First Amendment in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977).

Appellant then met with a member of appellee's staff to discuss his proposed advertisement in light of these decisions. The meeting was inconclusive, in part because appellee is not authorized to issue advisory opinions, and in part because the parties agreed that there were items in appellant's proposed ad that were not specifically covered in *R.M.J.* However, because appellant believed that the Constitution permitted him to do so, he decided to run the following ad, which was virtually identical to the ad that he had discussed with the staff of appellee:



DID YOU USE THIS IUD?

The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates

52 West Whittier Street

Columbus, Ohio 43206

Between March 10, 1982, and May 22, 1982, this ad ran in 36 Ohio newspapers with a combined circulation of 1,860,160. As a result, approximately 235 individuals contacted appellant. Of these he filed lawsuits on behalf of 95 individuals, on a contingent fee basis, seeking recovery for damages as a result of their use of the Dalkon Shield.

The other advertisement run by appellant appeared for two days only, on November 25 and 26, 1981, in *The Columbus Citizen Journal.* It provided as follows:

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

On November 26, appellant received a telephone call from a member of appellee's staff regarding the ad. The call advised appellant that his ad contained an offer to accept a criminal case on a contingent fee basis, which was prohibited by DR 2-106(C). Appellant immediately withdrew the ad, wrote appellee a letter, and declined to represent two individuals who contacted him after reading the ad.

2. The Charges

This disciplinary proceeding was commenced by the filing of a complaint by appellee on July 29, 1982. The principal focus of the complaint, which alleged a violation of various provisions of the Disciplinary Rules, was on the Dalkon Shield ad.[1]

Count IV asserted that the ad violated DR 2-101(B) because it contained a number of items of information, including the description of a particular legal problem, which were not included in the all-inclusive "laundry list" of matters which may be advertised under that Rule. The same Count alleged that the ad also violated DR 2-101(A), which prohibits false

[1]Because Counts I and VII did not allege any independent substantive violations, and because neither the Board nor the Court found a violation under Count VI, the allegations in those Counts will not be described.

and misleading advertising, but the complaint gave no specifics to support that charge. In Count V, appellee alleged that, because the ad containing a drawing of a Dalkon Shield, it violated DR 2-101(B), which prohibits any illustrations other than a picture of the lawyer or a portrayal of the scales of justice.

Although more than eight months had passed since appellant had run and, at appellee's request, cancelled the "drunk driving" ad, he was also charged with violations based on it in Counts II and III. The theory of both counts was that appellant had offered to handle drunk driving cases on a contingent fee basis. Thus, appellee alleged in Count II that appellant violated DR 2-101(B)(15) because his ad did not contain the information required by that provision relating to contingent fee cases. In Count III, appellee charged that, since DR 2-106(C) forbids contingent fees in criminal cases, appellant's ad could not be fulfilled, and hence was false, fraudulent, misleading, and deceptive in violation of DR 2-101 (A).

The parties entered into a detailed stipulation of facts on September 13, 1982, and on the same date appellant filed a motion to dismiss. His accompanying memorandum dealt principally with his assertion that the publication of the Dalkon Shield ad could not be prohibited consistent with the First Amendment. As to the drunk driving ad, he argued that, since it was not an offer to handle a case on a contingent fee basis, it was not subject to the disclosure requirements of DR 2-101(B) (15), and for the same reason did not violate the prohibition against contingent fees in criminal cases in DR 2-106(C). That motion was denied, and on December 17, 1982, appellee filed an amended complaint.

The principal purpose of the amended complaint was to add two new counts based on the Dalkon Shield ad. Count VIII focused on the fact that the ad stated that the representation would be on a contingent fee basis, but failed to contain any statement as to how such fees were to be computed. According to appellee, DR 2-101(B)(15) requires that all adver-

tisements regarding contingent fees must disclose whether percentages are computed before or after deduction of court costs and expenses. Since appellant did not include that information (indeed, he included no rate information at all, but simply stated that his representation would be on a contingent fee basis), he was alleged to have violated that Rule. Appellee also charged that failing to include the information regarding the computation of the contingent fee was "likely to mislead the public" and hence was a deceptive statement in violation of DR 2-101(A).

The final Count charged violations of DR 2-103(A) and DR 2-104(A), the anti-solicitation provisions of the Ohio Code of Professional Responsibility. The first of these sections prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer, and according to appellee, appellant violated that provision because his ad recommended his own employment. The other provision, DR 2-104(A), prohibits an attorney from accepting employment after giving unsolicited legal advice to an individual to take legal action, and was also allegedly violated by the publication of the Dalkon Shield ad and appellant's acceptance of clients who responded to it.

Appellant answered the amended complaint on January 14, 1983, and raised the First Amendment, as well as numerous other defenses, to each of the charges involving the Dalkon Shield ad. Paragraph 46 of his answer quoted paragraph 30 of the stipulation of September 13, 1982, in which the parties agreed that:

> The Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

The parties entered into another stipulation of facts on May 24, 1983, and on that date a hearing was held before a three-member panel of the Ohio Board of Commissioners on Grievances and Discipline.

At the hearing appellee offered in evidence three stipulations, copies of the two advertisements, and appellant's letter concerning the drunk driving ad. Appellant was also called to testify, but only regarding the Dalkon Shield ad. Appellee offered no evidence in support of the constitutionality of the Rules and indeed argued that appellant should not be permitted to do so either. Thereafter, appellant called a number of witnesses to testify, *inter alia,* to the value of advertising and illustrations in general and to the importance of the illustration in this ad as a means of communicating effectively with women who may have been injured by the Dalkon Shield. On June 13, 1983, the parties filed post-trial briefs, and on June 24 the Panel issued its decision, which was adopted by the whole Board except as to the recommended punishment.

3. The Board Decision

The Board, which is composed of seventeen members of the Ohio Bar who are appointed by the Ohio Supreme Court, first addressed the drunk driving ad. Appellee had based its case in Counts II and III on its position that the ad was an offer to take a contingent fee matter in a criminal case, which is forbidden by DR 2-106(C). However, the Board found no violation based on this provision, since appellant had merely placed an ad and DR 2-106(C) prohibits entering into a contingent fee agreement in a criminal case, which appellant had not done (App. 12a). The Board nonetheless found a violation of the prohibition against misleading advertisements in DR 2-101(A) because:

> It is general knowledge which can be determined from Municipal Court reports to the Supreme Court that, in disposing of driving while intoxicated (OMVI) charges, in many cases, the charge is reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court. In that manner, the defendant would not be "convicted of drunken driving," and the legal fee would not be refundable. (App.11a).

There was, however, no evidence in the record to support such a finding. In addition, the Board's theory of liability had never been urged by appellee, and thus appellant had no opportunity to offer evidence or present other defenses to it. Accordingly, in his August 24, 1983 brief to the Supreme Court of Ohio (pp. 76-82), appellant specifically argued that these departures from the charges brought by appellee constituted a violation of the Due Process Clause of the Fourteenth Amendment.

The Board also ruled that appellant's Dalkon Shield ad violated the Disciplinary Rules. First, it found that appellant had violated DR 2-103(A) (which it erroneously referred to as DR 2-102(A)), because the ad "implicity [sic] recommended that readers of the advertisement employ him or an associate before any reader sought his advice regarding employment of a lawyer" (App. 13a), a charge which, if sustained, would apply to virtually every ad any lawyer has ever placed.

As to the charge alleging insufficient disclosures of appellant's contingent fee arrangement, the Board sustained the charge on two separate grounds, one of which had not previously been asserted by appellee. It agreed with appellee that a lawyer who mentions contingent fees in an ad must include all of the contingent fee rate information which is noted in DR 2-101(B)(15) and that appellant had not done so (App. 14a). The Board also found that the ad was misleading, and hence in violation of DR 2-101(A), since it failed to disclose that the client would be liable for costs and expenses even if she did not prevail, and thus allegedly left the impression that the client would owe nothing. *Id.* Once again, like the drunken driving finding, this charge had never previously been made, and appellant had no opportunity to defend himself against it.[2]

---

[2]Unlike the other violations regarding the Dalkon Sheld ad, the failure to include appellant's contingent fee rates and to state the client's obligation to pay costs could readily have been cured, with no adverse effect on the overall thrust of the ad, if appellee had indicated that there was a problem. So far as the record discloses, appellee's staff never raised the issue of contingent fee disclosures at the

Next, as to the inclusion of the Dalkon Shield drawing, the Board found a violation of DR 2-101(B) and then offered a number of reasons why the prohibition against the use of nearly all illustrations was appropriate. The principal basis for the Board's conclusion was that:

> evidence and general knowledge with respect to newspaper, magazine, and television advertising make it clear that the use of illustrations can be the cause of misunderstanding, misleading interpretation of an advertisement, distraction from reading or understanding the significant messages of the verbal portion of an advertisement and in general, color the reaction of the viewer to the advertisement (App. 14a-15a).

The Board found it to be "not unreasonable" to prohibit appellant's illustration, while allowing a lawyer to include a picture of himself or of the scales of justice (App. 15a).

Finally, the Board agreed with appellee that the statement that it was "not . . . too late to take legal action against the Shield's manufacturer," coupled with appellant's subsequent agreements to represent those who responded to the ad and requested his services, violated the prohibition in DR 2-104(A) against offering legal advice and accepting employment based on it (App. 15a).

The Board next turned to the constitutional considerations, principally by reciting the holdings in *Bates v. State Bar of Arizona,*, 433 U.S. 350 (1977) (*"Bates"*), *In re R.M.J.*, 455 U.S. 191 (1982) (*"R.M.J."*), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and quoting extensively from the *Ohralik* opinion in upholding the application of the Rules to these ads (App. 15a-18a). The Board then stated its conclusions and gave its recommendation. Whereas the Panel had recommended a public reprimand, the Board, although adopting all of the Panel's findings and conclusions, recommended

---

March 1982 meeting or at any other time. Indeed, this allegation was first made in December 1982 when appellee filed its amended complaint.

that appellant be indefinitely suspended from the practice of law (App. 20a).[3]

4. The Decision of the Supreme Court of Ohio

The Supreme Court of Ohio affirmed each finding of a violation by the Panel and the Board. Its brief opinion contained very little discussion of appellant's claims that the Board has not properly interpreted the Disciplinary Rules, and it made no mention of the due process claims that appellant had raised. It briefly touched on the First Amendment issues, discussing only the *Bates* and *R.M.J.* decisions. It correctly noted that neither case entirely precluded states from regulating lawyer advertising, but then stated that the Rules here met the requirements of advancing a substantial state interest and were narrowly drawn (App. 6a-7a). It then announced its conclusion that all of the Rules which had been called into question were reasonable and could constitutionally be applied to the Dalkon Shield ad. Although the Court recognized that appellant had introduced "a substantial amount of evidence . . . respecting the value of advertising to the public, and the unique value of respondent's Dalkon Shield advertisement in light of the public's limited awareness of the danger of that particular device . . ." (App. 2a-3a), it made no effort to weigh, as part of its First Amendment analysis, the benefits derived from the ad, including the fact that nearly 100 women learned of their rights and found a lawyer who agreed to represent them on a contingent fee basis.

The Court did not, however, adopt the punishment recommended by the Board, but instead imposed a public reprimand, as the Panel had suggested (App. 7a). The Court also imposed costs of $1,043.63 against appellant (App. 23a), and

[3]Under Ohio law, the minimum punishment for a violation of a Disciplinary Rule is a public reprimand, with the next most serious punishment a one-year suspension Rule V, ¶. 6. For a second offense, a lawyer must be indefinitely suspended or permanently disbarred, depending on the seriousness of the misconduct. Rule V, ¶. 7.

on May 23, 1984, it denied his motion to stay execution of its judgment pending appeal to this Court. This appeal followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

Seven years after *Bates,* lawyer advertising remains an area fraught with dangers for practitioners. On the one hand, this Court has laid down guidelines which appear to permit a wide range of advertising by lawyers, provided that the advertising is not false or misleading and does not pose special dangers to the public. On the other, many states, including Ohio, have not revised their rules governing lawyer advertising in light of this Court's decisions and continue to enforce highly restrictive prohibitions, such as the laundry list of permitted subjects contained in Ohio's DR 2-101(B). As a result, attorneys who wish to use advertising for what this Court recognized to be the important purpose of informing the public of their availability to handle legal matters are compelled to maneuver through what is at best an uncharted legal minefield, with their careers and livelihoods in jeopardy if they overstep the indeterminate boundaries.

This case is an appropriate one to resolve some of this uncertainty because it squarely presents a number of unanswered First Amendment questions:

> — May a state discipline an attorney for publishing an advertisement which describes a specific legal problem and offers the attorney's services in handling it?
>
> — May a state impose an outright ban on any advertising that contains an illustration other than the scales of justice or a picture of the attorney?
>
> — May a state force an attorney to publish detailed information relating to his fee structure if the attorney simply wishes to advertise that he accepts cases on a contingent fee basis?

Each of these questions is substantial in its own right, and until answered, lawyers who wish to provide more than the most minimal amount of information in their ads will run the substantial risk of becoming the subject of a disciplinary proceeding. More importantly, perhaps, is the fact that the American public has an even greater stake in assuring the removal of unnecessary barriers to the free flow of information from lawyers than does the Bar:

> Bates is not a decision for the benefit of the bar; it is a decision for the benefit of consumers of legal services, and it is from their viewpoint that the problem must be approached.

Durham v. Brock, 498 F. Supp. 213, 222 (M.D. Tenn. 1980).

This case also presents important questions relating to the procedures which a state must employ in the prosecution of a lawyer for improper advertising, particularly where it claims that an ad is misleading. Here, appellant was disciplined for violations with which he was never charged, and thus never had an opportunity to defend himself. This Court should make it clear that states must abide by the principles of due process—something that Ohio failed to do here—when seeking to discipline attorneys.

A. This Appeal Presents Important Questions Under the First Amendment.

In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) (*"Central Hudson"*), this Court set forth a four-part test to determine whether commercial speech, such as advertising, is protected by the First Amendment. The first requirements are that the statement "must concern lawful activity and not be misleading." *Id.* at 566. Next, a court must ask "whether the asserted government interest is substantial" and then "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* And, in making those determinations, the party seeking to

uphold the restriction has the burden of justifying it. *Bolger v. Youngs' Drug Products Corp.*, 103 S.Ct. 2875, 2882 n.20 (1983).

The Ohio Supreme Court reprimanded appellant for publishing his Dalkon Shield ad, finding five separate violations of its Disciplinary Rules. In turn, these five can be divided into the two categories reflected in the first two questions presented on this appeal: those involving claims of solicitation and those relating to the contents of this ad. For the reasons more fully discussed below, appellant contends that neither category of charges can be sustained under the tests established in *Central Hudson* and, perhaps more importantly, they are wholly at odds with the approaches in, if not the actual holdings of, *Bates* and *R.M.J.*

1. The Anti-Solicitation Charges (Question 1): Since the parties stipulated that the advertisement was not misleading, and appellee conceded that it dealt with lawful activity, it is necessary to determine whether the governmental interest in preventing appellant from running the ad and accepting employment from those who responded to it is substantial, whether the regulation directly advances that interest, and whether it is more extensive than necessary to achieve that end. The solicitation charges are contained in Count IX and assert, in essence, that this ad may be prohibited without regard to its content because of other policy reasons. However, as this Court noted in *Central Hudson, supra:* "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy." 447 U.S. at 566, n.9.

The Board found a violation of DR 2-103(A) based on the fact that the ad implicitly recommended appellant's employment to the reader, and the Ohio Court approved that finding. Both the Board and the Court reached that determination without discussing the fact that the advertisement approved by this Court in *Bates* also contained the same kind of implicit recommendation. The only difference is that the Dalkon

Shield ad focused on a single type of legal matter whereas the ad in *Bates* addressed more general needs for legal services, but there is no reasoned basis for that difference to alter the outcome. Indeed, the "implicit recommendation" theory would seem to apply to virtually any ad placed by any lawyer, including that upheld in *Bates.*

Nor does the State's other solicitation charge rest on firmer ground. In many respects DR 2-104(A) is similar to DR 2-103(A) as construed by the Ohio Court, except that to violate the former provision, a lawyer must both give unsolicited legal advice and accept employment arising out of that advice. Once again, it is difficult to believe that the outcome in *Bates* would have been different if the ad had read, "the law in Arizona does not require married couples to stay married if either of them wants a divorce." Surely, that would have constituted "unsolicited legal advice," particularly if the ad also had stated that "the law firm of Bates & O'Steen is available to do the necessary legal work for you." Similarly, an ad embodying the "legal advice" that "if you don't have a will, the State will decide who gets your assets when you die," would seem functionally indistinguishable from the instant ad, but also indistinguishable from *Bates,* as would an advertisement announcing, "if you have been discriminated against in your job because of race, sex, religion or national origin, you may have a claim against your employer." See *State v. Schaffer,* 649 P.2d 355 (Okl. 1982) (upholding an ad involving "advice" regarding adoptions).

It should also be noted that this case does not involve advice sent by direct mail, targeted to an individual, or given in person. Thus, in some respects the Dalkon Shield ad, which appeared only in newspapers of general circulation in Ohio, is less potentially troubling than the individual solicitation letter upheld by this Court in *In re Primus,* 436 U.S. 412 (1978), a case not discussed by the Ohio Supreme Court and simply cited by the Board. The Board also suggested that this Court's decision in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978), was "not wholly different" from the instant case

(App. 16a), despite the fact that *Ohralik,* which is the only post-*Bates* case upholding a restriction on commercial speech by lawyers, involved in-person solicitation of a recent accident victim in her hospital room.

The Ohio Court also failed to take into account that this Court's decisions overturning absolute prohibitions on commercial speech have been based on the public's need to obtain vital information about matters of concern to them. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 763-65 (1976); *Bates, supra,* 433 U.S. at 364. Thus, while protection of the public from misleading ads or overreaching tactics are substantial state interests, the prohibitions upheld below would deny the public vital information about their legal rights and the availability of a qualified lawyer who is willing to represent them, without any showing that the state's interests would be directly advanced by the prohibitions in a way no more restrictive than necessary to serve those interests. See *Central Hudson, supra,* 447 U.S. at 566.

A number of lower court decisions have upheld on First Amendment grounds efforts by lawyers to write directly to potential clients, a practice which if anything is more likely to be deserving of scrutiny than placing the Dalkon Shield ad at issue here. *See In the Matter of Discipline of Appert & Pyle,* 315 N.W.2d 204 (Minn. 1981) (Dalkon Shield solicitation), and *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania,* 579 F. Supp. 880, 888-91 (E.D.Pa. 1984). However, as the cases cited in note 11, page 889 of *Spencer* indicate, the state courts are sharply divided on this issue.

Moreover, as this Court noted in *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 n.6 (1977), "after *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental." Yet in this case appellee introduced no evidence to support the need for the restriction on the Dalkon Shield advertisement, nor did either the Board or the Court offer any reasons to justify it, but simply announced their conclusion that the ban was reasonable.

It is clear, however, that such conclusory statements will not satisfy the requirements that the governmental interests must be substantial, that the rule materially advance those interests, and that it be no more restrictive than is necessary. Indeed, restrictions no more intrusive than these were set aside in *Central Hudson, Carey v. Population Services International,* 431 U.S. 678 (1977), and *Bolger v. Youngs' Drug Products Corp., supra.* Accordingly, it is apparent that the solicitation bans upheld by the Ohio Supreme Court under DR 2-103(A) and DR 2-104(A) in this case raise substantial questions under the First Amendment which require full consideration by this Court.

2. The Content Restriction Charges (Question 2): The First Amendment questions raised by the content restrictions imposed by the Ohio Supreme Court also deserve plenary consideration by this Court. The principal basis for review is that appellee stipulated that "the Dalkon Shield advertisement published by the Respondent does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim" (paragraph 30, stipulation of September 13, 1982), thereby raising serious doubts that DR 2-101(B), which is intended "to facilitate the process of informed selection of a lawyer . . .," can constitutionally apply in these circumstances.

First, the Board found that the drawing of a Dalkon Shield in appellant's ad was in violation of DR 2-101(B), which imposes a flat ban on any type of illustration other than a photograph of the lawyer or portrayal of the scales of justice. The Court barely discussed the question, and the Board defended this restriction merely by a general claim about the potentially misleading effects of some illustrations. Contrary to the Board's assertion (App. 14a), there was, however, no "evidence" to support even this general assertion, let alone evidence that this ad had the potential to mislead its readers. To the contrary, appellant offered substantial evidence that his inclusion of a drawing of a Dalkon Shield helped a

number of readers identify that this advertisement related to a particular kind of IUD and to recognize that they might have a legal remedy against its manufacturer. In addition, appellant's witnesses also testified to the importance of illustations in conveying a message in a way that words alone could not, and in gaining the attention of the reader in order to convey the information contained in the written portion of the advertisement.[4]

Although DR 2-101(B) states that its purpose is to aid clients to make informed choices about retaining a lawyer, the effect of an illustration ban, at least as it applies to this case, is to make it less likely that injured women will learn about their potential rights against the manufacturer of the Dalkon Shield or will secure competent counsel. While neither *Bates* nor *R.M.J.* eliminates all restrictions on lawyer advertising, the decision below does not meet the test set forth in *R.M.J.* which permits discipline to be imposed only where "the particular advertisement is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." 455 U.S. at 202. *See also In the Matter of Disciplinary Proceedings Against Marcus,* 107 Wis.2d 560, 390 N.W.2d 806, 815 (1982) (imposing a burden on the Bar of establishing by "clear and satisfactory evidence" that ads are inherently or actually misleading).

The other two violations relate to certain nondisclosures regarding appellant's contingent fee arrangements. Appellant's ad merely stated that representation in Dalkon Shield litigation would be on a contingent fee basis, but did not state either the rates to be charged or whether those undisclosed percentages would be computed before or after costs were paid. According to appellee, those omissions violated the specific requirement for inclusion of contingent

---

[4]Indeed, a picture of the scales of justice allows the very attention-getting purpose that the Dalkon Shield served here, which is presumably the same purpose that would be served by including a photograph of the lawyer, which is also permitted.

fee rate information in DR 2-101(B)(15) and the prohibitions against misleading advertisements in DR 2-101(A).

However, to sustain that broad interpretation by the Ohio Supreme Court, the state must show that a substantial state interest is served by the rule which says, in effect, that if a lawyer mentions contingent fees in an advertisement, he or she must include the percentages applicable (which may vary from case to case) and must state how costs are handled in all such cases. Appellee offered no evidence to justify such a mandatory provision, nor were any reasons offered by the Board or the Court for imposing that requirement. While the Court did mention both *Bates* and *R.M.J.*, it failed to discuss how this requirement was consistent with those decisions, or how it met the mandates of *Central Hudson*. Nor did it discuss the basis on which lawyers are permitted to advertise hourly rates and fixed fees for specific legal services under subparts 16 and 17 of DR 2-101(B), but are not required to make similar disclosures for rates in those circumstances. In short, nothing in either *Bates* or *R.M.J.* appears to support these rigid, mandatory requirements, and their validity surely presents a substantial constitutional question under the First Amendment.[5]

---

[5]The Board also found a violation of DR 2-101(A) on the ground that the advertisement stated that no legal fees would be owed if there was no recovery, which suggested to the Board that costs need not be paid either (App. 14a). Once again, there was no discussion of the constitutional standards, nor any proof that clients would not be able to distinguish between legal fees and costs. More importantly, appellee never charged that the failure to disclose the obligation to pay costs was misleading. Count VIII, ¶ 27 of the amended complaint, alleged only that "the failure to include the qualification regarding *computation* of contingent fee is a violation of DR 2-101(B)(15) and a violation of DR 2-101(A) as a deceptive statement likely to mislead the public"(emphasis added). This allegation, coupled with the allegation in ¶ 26 that there was no statement "about the method for computing such fee as required by DR 2-101(B)(15)," make it clear that appellant was charged under two different provisions for failure to include the information required by subpart 15. Thus, because he was never charged with having made a misleading statement based upon the "no legal fees" assertion being equivalent to a "no-cost" assertion, it would be a violation of due process if he were found guilty of placing a misleading advertisement on that basis. *See* Part B, *infra*.

B. Appellant's Due Process Claims as to the Drunk Driving Ad Are Substantial.

Counts II and III dealt with the drunk driving advertisement. Both proceeded on a common theory: the ad proposed a contingent fee in a criminal case, which is prohibited by DR 2-106(C). Since appellant did not enter into any such agreement, appellee acknowledged that he did not violate the substantive Rule. Appellee nonetheless argued that the ad was prohibited because it was for a transaction into which, appellee contended, appellant could not lawfully enter, and hence the ad could be prohibited as deceptive under DR 2-101(A). In addition, appellee alleged that since the arrangement was for a contingent fee, then, like the Dalkon Shield advertisement, appellant was required to include the information contained in DR 2-101(B)(15), which he did not do.

The difficulty for appellee is that neither the Board nor the Court accepted its theories. The Board found no violation of DR 2-106(C), and the Ohio Supreme Court did not even mention that provision. Instead, the Board based its ruling on an entirely new theory—that the ad was misleading because of what the Board said was the common practice of defendants pleading guilty to lesser included offenses when charged with drunk driving. Under the Board's theory, because the client would not be convicted of drunken driving, no refund would be paid, and the public would have been misled by appellant's ad. However, the theory was never urged by appellee, but was invented by the Board after the trial, after all of the evidence was in, and after counsel had submitted their post-trial briefs. Indeed, appellee recognized that this was a change in theory since in its brief to the Ohio Supreme Court, it simply agreed that the Board's finding was correct, but urged the Court to rule on the theory on which it had initiated and tried the case.

Changing theories in midstream in lawyer disciplinary proceedings has previously been condemned by this Court in *In re Ruffalo*, 390 U.S. 544 (1968). There, this Court ruled that a lawyer is "entitled to procedural due process, which includes fair notice of the charge." *Id.* at 550. It went on to observe

that the "charge must be known before the proceedings commence. They become a trap when, after they are under way, the charges are amended on the basis of testimony of the accused." *Id.* at 551. The Court further noted that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." Id. at 552.

A similar violation of due process was overturned by this Court in *Cole v. Arkansas,* 333 U.S. 196, 201 (1948), where an appellate court upheld a conviction on the basis of a section not charged, rather than the one on which the case was tried:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

As the Court stated, it is "as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *DeJonge v. Oregon,* 299 U.S. 353, 362 [1937]." *Id.* See also *Morgan v. United States,* 304 U.S. 1, 18-22 (1938), and *Wolff v. McDonnell,* 418 U.S. 539, 564 (1974).

Aside from the notice violation, due process was also offended because of the total absence of any evidence in the record to support the essential factual predicate relating to the practices at the Municipal Courts. See *Thompson v. Louisville,* 362 U.S. 199 (1960). Whether due process would allow the reports of the Municipal Courts to be received in evidence to prove the practice alleged would depend on whether there is sufficient assurance of their "underlying reliability and probative value." *Richardson v. Perales,* 402 U.S. 389, 402 (1971). But to take judicial notice of the contents of those reports, and to generalize about the practice in the Municipal Courts based on them in order to make a determination of

whether an ad is misleading, without giving appellant any opportunity to respond to the actual charge of which he was found guilty, is surely a violation of fundamental due process. *See Greene v. McElroy,* 360 U.S. 474, 496 (1959) ("... where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue"). *But see Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961). Moreover, the Ohio Supreme Court's casual acceptance of the Board's expansive use of judicial notice, especially in a First Amendment context, runs counter to the emphasis in *R.M.J.* on record support for a finding that an advertisement is misleading. *See* 455 U.S. at 202, 205-07.

Accordingly, either the absence of fair notice of the charges or the failure to offer evidence to support the claim that the drunk driving ad was misleading is sufficient to overturn the Ohio Supreme Court's ruling. Taken together, they constitute a fundamental deviation from the mandates of the Due Process Clause and present a substantial question for this Court to review.

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
David C. Vladeck
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

David K. Frank
Schwenker, Cloud & Tudor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Attorneys for Appellant

July 2, 1984

APPENDIX A

OFFICE OF DISCIPLINARY COUNSEL v. ZAUDERER.

[Cite as Disciplinary Counsel v. Zauderer (1984), 10 Ohio St. 3d 44.]

Attorneys at law—Misconduct—Public reprimand—DR 2-101(B) permissibly restricts commercial speech and is constitutional.

O.Jur 3d Attorneys at Law § 34.

DR 2-101(B) of the code of Prosessional Responsibility permissibly restricts the content of protected commercial speech and is therefore not violative of the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

(D.D. No. 83-19—Decided April 4, 1984.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Bar.

On July 29, 1982, the Office of Disciplinary Counsel, relator herein, filed a complaint against Philip Q. Zauderer, respondent herein, alleging that respondent violated certain Disciplinary Rules of the Ohio Code of Professional Responsibility with the publication of two legal service advertisements.

The first advertisement related to respondent's availability for representation of individuals charged with driving while intoxicated. That advertisement appeared in one newspaper for a period of two days, at which time respondent voluntarily withdrew it. He accepted no employment as a consequence of that advertisement.

The second advertisement related to respondent's avail-

ability for representation of women in connection with injuries resulting from the use of a particular intrauterine [sic] birth control device known as the "Dalkon Shield." This advertisement, which was the subject of six of the nine counts of the relator's complaint as later amended, contained various types of information, including: (1) a diagram of the Dalkon Shield; (2) statements that the Dalkon Shield has been alleged to have caused serious injuries to its users; (3) a statement that it may not be too late to take legal action against the Dalkon Shield's manufacturer; (4) the statement that the respondent's firm is representing women who have sustained such injuries; and (5) statements that the respondent's fees for such representation are payable on a contingency basis.[1] The Dalkon Shield advertisement did not state the percentage of the respondent's contingent fee rates nor did it describe potential litigation-related costs.

On May 24, 1983, a hearing was held on these matters before a three-member panel of the Board of Commissioners on Grievances and Discipline (hereinafter "board"), at which time a substantial amount of evidence was introduced respecting the value of advertising to the public, and the unique value of respondent's Dalkon Shield advertisement in light of the public's limited awareness of the dangers of that particular device. As a result of that hearing, the panel recommended that respondent receive a public reprimand.

[1]The Dalkon Shield advertisement at issue contained an illustration of the device itself and copy which read as follows:

"Did you use this I.U.D.? The Dalkon Shield Interuterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients. For free information call 1-614-444-1113. The law firm of Philip Q. Zauderer & Associates, 52 West Whittier Street, Columbus, Ohio 43206."

The board declined to adopt the panel's recommendation, however, and recommended instead that respondent be indefinitely suspended from the practice of law. This disciplinary measure was based upon the board's findings that: (1) use of the Dalkon Shield diagram violated the prohibition of DR 2-101(B) against illustrations; (2) the Dalkon Shield advertisement contained an implicit self-recommendation of employment and respondent, through such advertisement, gave unsolicited legal advice and, therefore, his acceptance of employment violated DR 2-104(A); (3) the failure to include specific information relating to potential litigation-related costs rendered the Dalkon Shield advertisement misleading in violation of DR 2-101(A); (4) the failure to state specific fee rates in the Dalkon Shield advertisement constituted a violation of DR 2-101(B)(15); and (5) in recommending employment of himself as a private practitioner to a non-lawyer who had not sought his advice regarding employment of a lawyer, respondent violated DR 2-103(A). The board specifically rejected respondent's assertions that the Disciplinary Rules, as applied to the Dalkon Shield advertisement, are violative of the constitutional guarantees of free speech.

As to the drunk driving advertisement, the board found that respondent violated DR 2-101(A).

The American Civil Liberties Union Foundation of Ohio, Inc., the Dispatch Printing Company, and the Ohio Newspaper Association have filed *amicus curiae* briefs urging this court to strike as constitutionally infirm the Disciplinary Rules in question.

Mr. Angelo J. Gagliardo, disciplinary counsel, and *Mr. Mark H. Aultman,* for relator.

Mr. David K. Frank, for respondent.

Messrs. Gingher & Christensen, Mr. Paul R. Gingher, Mr. Daniel G. Hale and *Mr. Malcolm L. Miller,* for *amicus curiae,* Ohio Newspaper Association.

Messrs. Jones, Day, Reavis & Pogue, Mr. John W. Zeiger and *Mr. Todd S. Swatsler,* for *amicus curiae,* Dispatch Printing Company.

Messrs. Porter, Wright, Morris & Arthur and *Ms. Lita C. Miller,* for *amicus curiae,* American Civil LIberties Union Foundation of Ohio, Inc.

CLIFFORD F. BROWN, J. This is a case of first impression in Ohio concerning the constitutional validity of Disciplinary Rules which restrict the content of legal service advertisements. Specifically, the question presented herein is whether the content restrictions of DR 2-101(B)[2] violate the

[2]DR 2-101(B) reads as follows:

"In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

"(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

"(2) One or more fields in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

"(3) Age;

"(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

"(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

"(6) Public or quasi-public offices;

"(7) Military service;

"(8) Published legal authorships;

"(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

"(10) Foreign language ability;

"(11) Whether credit cards or other credit arrangements are accepted;

[contd.]

First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

As to the Dalkon Shield advertisement we agree with the findings of the panel and board that respondent violated DR 2-101(B), prohibiting illustrations in an advertisement; DR 2-104(A), in accepting employment resulting from unsolicited advice given by him to a non-lawyer; DR 2-101(A), in publishing communications which were misleading; DR 2-101(B)(15), by failing fully to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of publishing the advertisement; and DR 2-103(A), in recommending employment of himself as a private practitioner to a non-lawyer who had not sought his advice regarding employment of a lawyer.

These sections which the panel and board found had been violated by the respondent are constitutional provisions of the Ohio Disciplinary Rules as contained within the Code of Professional Responsibility.

[footnote 2, contd.]

"(12) Office and telephone answering service hours;

"(13) Fee for an initial consultation;

"(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

"(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

"(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

"(17) Fixed fees for specific legal services;

"(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

"(19) Memberships and offices in legal fraternities and legal societies;

"(20) In law directories and law lists only, names and addresses of references, and, with their written consent names of clients regularly represented."

The holdings of the United States Supreme Court in *Bates v. State Bar of Arizona* (1977), 433 U.S. 350, and *In re R.M.J.* (1982), 455 U.S. 191, do not totally prohibit the states from restricting lawyer advertising. The court in *Bates,* at 383-384, stated that there could well be a number of areas where restrictions are allowed. Certainly one such area is where the advertising is misleading *per se,* or may be misleading in its reach and interpretation. A potential client peering at a lawyer advertisement may be misled or confused by the expressed words, by an illustration or drawing, or by a combination of both.

In the subsequent case of *In re R.M.J.,* the court at page 203 recognized that the state retains some authority to regulate a communication which is not misleading in nature. The state must, however, assert a substantial interest in the regulation and the restriction on the advertisement must be in proportion to the interest served.

Although the restrictions must be narrowly drawn, this state's Disciplinary Rule concerning lawyer advertising passes constitutional muster. Each restriction is closely related to a substantial state interest. It is our view that an allowable restriction for lawyer advertising is that of asserted expertise of the advertising lawyer. A lawyer should not be permitted to hold himself out as an expert in certain designated areas unless there are in existence certain standards or criteria that have been promulgated by the court and set forth in the Disciplinary Rules.

Also, requirements relative to the content of the advertising concerning legal fees would be permissible under the United States Supreme Court rulings cited. Certainly for purposes of clarity to those reading a lawyer advertisement which refers to contingent fees, the requirement should be that such fees be specifically expressed, as well as any additional costs that might be assessed the client.

Also, it is reasonable for a state to impose restrictions upon lawyer advertising, prohibiting the lawyer from giving legal advice in a specific area, and then recommending employment of himself to those who have not sought his advice. Further, in this regard, the states may restrict the lawyer from accepting employment resulting from unsolicited advice given by him.

The specific subsections of DR 2-101(B) which were involved here and which were the basis of the sanctions recommended for the respondent are not unconstitutional. Although some other portions of DR 2-101(B) may be found to be constitutionally overbroad it is not necessary that we scrap the totality of this Disciplinary Rule.

With respect to the drink driving advertisement, the board found that respondent violated DR 2-101(A). The board reasoned that the phrase "Full legal fee refunded if convicted of Drunk Driving," as contained in the ad, encouraged the reader to believe that he could obtain representation in a criminal case at no cost. However, in view of the common practice of entertaining a plea of guilty or no contest to a lesser included offense when a person is charged with operating a motor vehicle while intoxicated, this interpretation would be erroneous. If such a plea were entered, the defendant would not be "convicted of drunk driving" and therefore the legal fee would not be refundable.

While we agree with the board's conclusion that the drunk driving advertisement was "misleading and deceptive" in violation of DR 2-101(A), we also note that respondent voluntarily withdrew the advertisement from circulation after only one publication and did not accept any clients as a result thereof.

Accordingly, we accept the hearing panel's recommendation and hereby determine that respondent's conduct warrants a public reprimand.

Judgment accordingly.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHNER, HOLMES and J.P. CELEBREZZE, JJ., concur.

APPENDIX B

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re Complaint Against	)	
	)	**No. 454**
Philip Q. Zauderer,	)	**Findings of Fact and Recommendation of**
Respondent	)	**the Board of Commissioners on**
Office of Disciplinary Counsel,	)	**Grievances and Discipline of The**
Relator.	)	**Supreme Court of Ohio**

• • •

FINDINGS OF FACT

This matter, a complaint against Philip Q. Zauderer, respondent, came on to private hearing on May 24, 1983 in Columbus, Ohio at the Lobby Hearing Room, State Office Tower. Present at the hearing were Philip Q. Zauderer, Respondent, his counsel, David K. Frank, Kathryn Haller, Assistant Disciplinary Counsel, and Angelo J. Gagliardo, Disciplinary Counsel, representing the Relator.

The hearing was held before commissioners Robert W. lakemore, Erwin L. Clemens and Robert B. Gosline.

The Relator presented joint stipulation exhibits Nos. l, 2 and 3, stipulations of fact previously filed in this proceeding on September l3, l982 November 23, l982, and May 24, l983. Relator presented Exhibits A, B and C, which include copies of the advertisements under consideration. Relator also called the Respondent for cross-examination and presented exhibits in connection with that testimony.

Respondent presented nine witnesses, including four expert witnesses qualified in the areas of communication, news media, advertising, constitutionality of lawyer advertising, and Supreme Court rules on lawyer advertising in Pennsylvania and throughout the United States, a fact witnesses testifying with respect to Ohio Bar Association institutional advertising, two persons who had responded to Zauderer's advertising and later became clients, and one character witness. With these witnesses Respondent offered 41 exhibits. All evidence is relevant to the Findings of Fact and will be so considered together with other pleadings, including Respondent's answers to interrogatories.

The Amended Complaint is based on two different advertisements placed by Respondent in newspapers of general circulation, the first advertisement appeared in a Columbus newspaper, and the second advertisement was published in newspapers throughout the State of Ohio.

Counts II and III allege violations of DR 2-l0l(B)(l5) and DR 2-l0l(A) in advertising a contingent fee in drunk driving criminal cases under conditions which are not permitted by the Code of Professional Responsibility and by reason of those conditions, the advertisement is alleged to be misleading. This ad, Exhibit A to the Complaint, offers "Full legal fee refunded if convicted of DRUNK DRIVING."

Counts IV through IX of the Complaint allege violations of DR 2-l0l(A) and (B) in publishing a legal service advertisement addressed to women who may have suffered personal injury from using the Dalkon Shield Interuterine Device suggesting the possibility of legal action against the Shield's manufacturer and stating that Respondent's law firm represents women on such cases and suggesting that any reader call Respondent's law firm "for free information." Exhibit B.

Count V alleges a violation of DR 2-l0l(B) in that the advertisement includes a drawing, illustration, of the Dalkon Shield.

Count VI alleges a violation of the same section because the advertisement is not presented in "a dignified manner."

Count VII alleges a violation of governing Rule V and Respondent's oath of office as a lawyer.

Count VIII alleges a violation of DR 2-101(B)(15), because it does not disclose whether percentages are computed before or after deduction of court costs and expenses. It also asserts a violation of DR 2-101(A) in that this failure to disclose constitutes a deceptive statement.

Count IX alleges that the advertisement provided unsolicited legal advice, recommended Respondent for employment, and Respondent accepted employment in violation of DR 2-103(A) which prohibits an attorney from recommending employment of himself to one who has not sought his advice regarding the employment of a lawyer and DR 2-104(A) which prohibits an attorney from accepting employment after giving unsolicited advice to an individual that he obtain counsel or take legal action.

With respects to Counts II and III, Respondent denies violation of the DR's.

In response to Counts IV through IX, Respondent's answer admits that the challenged advertisement was published in a newspaper on March 11, 1982 and that the content of that advertisement "may, in part, technically violate DR 2-101(B)" and that the illustration in the advertisement "may technically violate" DR 2-101(B).

The answer alleges that Exhibit B, was published only after the United States Supreme Court decision in the case of *In re R.M.J.*, 455 U.S. 191 (Jan. 25, 1982) and after a conference on March 5, 1982 with Disciplinary Counsel.

The answer denies the other operative allegations of Counts V through IX concerning the nature, intent and form of the advertisement Exhibit B.

The answer asserts 22 affirmative defenses based on the First, Ninth and Fourteenth Amendments to the United States Constitution and Sections 1, 11 and 20 of the Ohio Constitution; the "public's rights" guaranteed by the same United States Constitutional amendments and the same articles and sections of the Ohio Constitution; estoppel from prosecution

by reasons of the conference with Disciplinary Counsel after *In re R.M.J., supra;* and other defenses directed to the Disciplinary Rules.[1]

Other defenses state denial and disagreement with the Relator's construction and application of the Disciplinary Rules and of the advertisement.

STATEMENT OF THE FACTS

The Respondent, Philip Q. Zauderer was admitted to practice law in Ohio in October 17, 1964. His office is located on Whittier Square, 52 W. Whittier Street, Columbus, Ohio 43206. Copies of the advertisements, Exhibits A and B, are attached to this report.

The Drunk Driving Advertisement. This advertisement, Exhibit A, was published one time only. Respondent did not accept any clients on the basis stated in the advertisement and it was immediately withdrawn. Subsequently, he sent a letter to Office of Disciplinary Counsel acknowledging that it was a violation of the Disciplinary Rule "prohibiting contingency fees in criminal cases" and giving assurance that he would not make "any such mistakes in the future."

It is general knowledge which can be determined from Municipal Court reports to the Supreme Court that, in disposing of driving while intoxicated (OMVI) charges, in many cases, the charge is reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court. In that manner, the defendant would not be "convicted of drunk driving," and the legal fee would not be refundable. This advertisement was misleading and deceptive in violation of DR 101-(A).

Because DR 2-106(C) provides only that "a lawyer shall not enter into an arrangement for, charge or collect a con-

[1]Respondent's Ninth Defense quotes Governing Rule V, Section (4), after investigation "a decision as to disposition of such complaint shall be made within 30 days thereafter," following the authority of the decision in *Kves v. Penn Rd. Co.* (1952), 158 Ohio St. 362, order was entered dismissing this defense on the ground that 30-day limitation is "directory and not mandatory" and failure to comply does not deprive the court of jurisdiction.

tingent fee" in a criminal case, the advertisement itself does not violate that section.

The Dalkon Shield Advertisement. This is Exhibit B to the Complaint. It contains an illustration of a Dalkon Shield I.U.D. In text, it states that this is alleged to cause various injuries. It includes the statement, 'Do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients. For free information call [telephone number of Respondent]." At the bottom is "The Law Firm of Philip Q. Zauderer & Associates" with its address.

Prior to November, 1981, and in the period of time from May 26, 1981 through August 18, 1981, Respondent and Disciplinary Counsel discussed newspaper advertisements proposed to be run by Respondent. These discussions included the Dalkon Shield advertisement which had been used by Minnesota attorneys, Appert and Pyle. That contained an illustration of the I.U.D. and a verbal text very similar to Exhibit B. Prior to October, 1981, Disciplinary Counsel advised Respondent that the Appert and Pyle advertisement did not comply with Ohio DR 2-101(B).

On December 17, 1981, the Supreme Court of Minnesota decided the case of *In re Appert and Pyle*, 315 N.W.2d 204 (Minnesota, 1981). The Dalkon Shield advertisement was one subject of that suit. The Court held that the Minnesota Disciplinary Rule which had the effect of prohibiting attorneys from such advertising was an unconstitutional restriction on the attorneys' and the publics' First Amendment right of free speech.

On January 25, 1982, the United States Supreme Court issued its decision *In re R.M.J.*, 455 U.S. 191 (1982). That case involved a disciplinary rule of the Missouri Supreme Court relating to advertising by lawyers. By that rule, a lawyer advertising was limited to ten categories of information. The court held that "in the circumstances of this case" the restrictions of the Missouri rule could not be sustained. The court emphasized that the states retained the authority to regulate advertising that is misleading. 455 U.S. at 200.

On March 5, 1982, respondent met with Disciplinary Counsel and, as a proposed advertisement, showed him a copy of what is Exhibit B. After discussion, "it was recognized by both the Respondent and [Disciplinary Counsel] that the Dalkon Shield advertisement did not conform to Ohio DR 2-101(B)." "It was agreed that there were items in DR 2-101 that the [U.S. Supreme] court in *R.M.J.* did not discuss." "[Disciplinary Counsel] did not advise Respondent that he should or should not publish the advertisement." Thereafter, Respondent took it upon himself to conclude that Disciplinary Counsel "would be bound to follow the ruling of the *R.M.J.* case," apparently claiming to himself that the ad would be constitutionally protected. Tr 197-98. Stipulation filed September 13, 1982, ¶¶ 24 through 27.

After March 8, 1982, Respondent placed the Dalkon Shield advertisement for publication in 36 newspapers of general circulation throughout Ohio, from the Akron Beacon Journal to the Zanesville Times Recorder. Stipulation filed September 13, 1982, ¶¶ 28 and 29 and stipulation filed November 23, 1982, ¶ 1. The total combined daily circulation of these newspapers was stipulated to be 1,180,160. Stipulation filed September 13, 1982, ¶ 29 and stipulation filed November 23, 1982, ¶ 2.

Two hundred thirty-five persons communicated with Respondent as a result of these advertisements. One hundred six of them retained him as attorney, and he accepted such employment. For each of them, he has filed a lawsuit in the United States District Court for the Southern District of Ohio. Respondent's answers to Relator's First Interrogatories, pages 3-24.

Recommendation of Employment for Himself. The advertisement, Exhibit B implicity recommended that readers of the advertisement employ him or an associate before any reader had sought his advice regarding employment of a lawyer. This

was in accord with his expressed interest to make the public aware that he was available to act as an attorney-at-law in this kind of cases. Tr. 29. The number of interviews and of professional engagements which resulted confirm the self-recommendation clearly inferred by it. This was a violation of DR 2-102(A), "A lawyer shall not recommend employment *** of himself."

Contingent Fee. The advertisement, Exhibit B, recites "the cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients." A representative contingent fee contract, states contingent fee rates of 33.33 per cent to 45 per cent if an appeal is necessary. If Respondent is discharged, he would be entitled to a reasonable value fee. The client will be liable for out-of-pocket costs "court costs, long distance telephone charges, court costs, document duplication costs, brief printing cost, postage, court reporter's fees, medical report expenses, witness fees, costs of obtaining evidence, necessary disbursements and reasonable travel expenses." Client must reimburse Respondent for those expenses, which can be very substantial.

In failing to disclose this information, the advertisement left standing the impression that if there were no recovery, the client would owe nothing. In this, the advertisement is misleading, in violation of DR 2-101(A) and in failing to include the contingent fee rates as called for by DR 2-101(B)(15).

Illustration In Advertisement. The advertisement, Exhibit B, displays a "drawing, illustration" in violation of DR 2-101(B). The prohibition and the violation are both clear.

Illustrations in advertising are an integral part of the advertisement. Tr. 65. They are attention-getters (Tr. 76) even though they may only collaterally relate to the advertisement. Respondent's Exhibits 17-20. Advertising agencies look upon this function of illustrations as appropriate. Tr. 76. And these illustrations are to help induce or persuade people to take action. Tr. 78.

The evidence and general knowledge with respect to newspaper, magazine, and television advertising make it clear that

the use of illustrations can be the cause of misunderstanding, misleading interpretation of an advertisement, distraction from reading or understanding the significant messages of the verbal portion of an advertisement and in general, color the reaction of the viewer to the advertisement. It is not unreasonable to restrict lawyer advertising to the single illustration which universally represents law and justice. As is done in DR 2-101(B). The same would be true with respect to "animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures."

The use of an illustration in the advertisement, Exhibit B, is a violation of DR 2-101(B).

Accepting Employment After Unsolicited Legal Advice. The advertisement, Exhibit B, did offer legal advice to all persons who responded to it. "Do not assume it is too late to take legal action against the Shield's manufacturer." Subsequently, Respondent accepted employment by 106 persons who counseled with him as a result of the advertisement. The DR 2-104(A) prohibition against such employment is specific and does not involve any right of communication or speech.

Respondent's conduct in this regard constitutes a violation of DR 2-104(A).

Estoppel. Respondent's consultations with Disciplinary Counsel do not create any estoppel to prosecuting these charges.

Respondent, in effect, concedes violation of DR 2-101 by publishing these advertisements, Exhibits A and B. Joint Exhibit 1, ¶ 24, Tr. 119. His thinking on publishing these advertisements and his principal defense to the Complaint is that the Ohio Supreme Court Disciplinary Rule on lawyer advertising is unconstitutional. Although it is not clear that this issue is for determination by the Panel or the Commission, *In re Ohralik* (1976), 48 Ohio St.2d 217, affm'd. 436 U.S. 447 (1978), the Board of Commissioners considered and "rejected" the defense of constitutionality and the Ohio Supreme Court adopted and "reiterated" this determination, the Panel submits its recommendation on this issue in the following paragraphs.

Constitutionality. Respondent has pleaded the defense that Ohio Supreme Court DR 2-l0l is unconstitutional in that, basically, it violates the United States Constitution, First and Fourteenth Amendments. He relies on *Bates v. State Bar of Arizona,* 433 U.S. 349 (1977) and *In re R.M.J.,* 455 U.S. 191 *(1982) and* distinguishes the case of *Ohio State Bar Association v. Ohralik, supra.*

Bates v. State Bar of Arizona, supra, considered lawyer advertising in terms of "commercial speech" and held that it was "entitled to some First Amendment protection." The court held that advertising routine legal services and the fixed rates at which they would be furnished was protected commercial speech and constitutionally protected by the First Amendment.

In re R.M.J., supra, held that the restrictions on lawyer advertising imposed by Missouri Supreme Court Rule 4 could not be sustained under the circumstances of that case. Those provisions were more restrictive than Ohio DR 2-l0l. However, neither of these decisions held that all restrictions on lawyer advertising are unconstitutional.

Ohralik, supra, considered a fact situation involving in-person solicitation of legal representation while the anticipated client was confined to the hospital after having been injured in an automobile accident. The in-person solicitation of employment by conference in Respondent's office, though voluntarily undertaken by the anticipated clients, is not wholly different from the *Ohralik* situation when the inequalities of the lawyer-client conference are considered. Also, the *Ohralik* opinion furnishes numerous general guides concerning the extent of First Amendment protection of commercial speech, that is, some protection, not complete protection.

> ***we instead have afforded commercial speech a limited measure of protection commensurate with its *subordinate* position in the scale of First Amendment values. 436 U.S. at 456. (Emphasis added)

* * *

* * * the *State does not lose* its power to regulate commercial activity *deemed harmful* to the public whenever speech is a component of that activity. 436 U.S. at 456.
(Emphasis added)

* * *

In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates.* 436 U.S. at 457

* * *

DR 2-l04(A) merely prohibited him from using the information as bait with which to obtain an agreement to represent them for a fee. The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice. 436 U.S. at 458

* * *

A lawyer's procurement of remunerative. employment is a subject *only marginally affected with First Amendment* concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests. 436 U.S. at 459. (Emphasis added)

* * *

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation

are prophylactic measures whose objective is the *prevention of harm before it occurs.* The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the *State has a strong interest* in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

* * *

The State's perception of the potential for harm in circumstances such as those presented in this case is well founded. The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. 436 U.S. at 464-65 (Emphasis added)

* * *

We hold that the application of *DR 2-103(A)* and *2-104(A)* to appellant does not offend the Constitution. 436 U.S. at 468. (Emphasis added)

See also, In re Primus, 436 U.S. 412 (1978); cf. *Lehman v. Shaker Heights* (1973), 34 Ohio St.2d 143, affm'd. 418 U.S. 298 (1974). (*Prohibition* of commercial speech by political advertising on public transit vehicles involved "no First or Fourteenth Amendment violation." 418 U.S. at 304.)

Under the facts of this case, the application of DR 2-101(A), DR 2-101(B)(15), DR 2-103(A), and DR 2-104(A) to Respondent does not offend the United States Constitution.

Conclusion. The panel find that by reason of the placement and publication of the advertisements, Exhibit A and B, and subsequent conduct directly related to those advertisements and his acceptance of employment, Respondent violated DR 2-101(A) in publishing public communications which were misleading, DR 2-101(B) by using a drawing, illustration in the advertisement, Exhibit B, DR 2-101(B)(15) by failing fully to disclose the terms of the contingent fee agreement which was intended to be entered into at the time of publishing the advertisement, Exhibit B, DR 2-103(A) in recommending employment of himself as a private practitioner to a non-lawyer who has not sought his advice regarding employment of a lawyer, and DR 2-104(A) in accepting employment resulting from unsolicited advice given by him to a non-lawyer.

RECOMMENDATION

The Relator expressed the opinion that one year suspension should be imposed as discipline. The Respondent, by counsel, stated that a public reprimand should be the maximum discipline considered.

Although Respondent placed the advertisements knowing that they were probably violative of Disciplinary Rules, it was discussed with the then Disciplinary Counsel in advance. There was no evidence of client dissatisfaction at or before the date of the hearing.

The Panel recommend that a public reprimand be administered to the Respondent.

Pursuant to Gov. R. V, the Board, on June 24, 1983, adopted the Findings of Fact and Conclusions of Law of the Panel and recommends an indefinite suspension from the practice of law.

/s/ Louis C. Damiani
Secretary, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

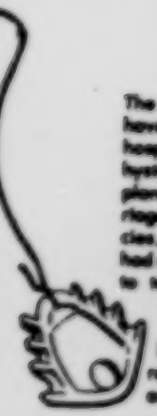
Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

Phillip Q. Zauderer & Associates,
Attorneys at Law
52 West Whittier, Columbus, Ohio 43206

EXHIBIT "A"

DID YOU USE THIS IUD?



The Dalkon Shield Intrauterine Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contigent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

For free information call 1-614-444-1113

The Law Firm of

Philip Q. Zauderer & Associates
52 West Whittier Street
Columbus, Ohio 43206

EXHIBIT "B"

APPENDIX C

The Supreme Court of Ohio
Columbus

Office of Disciplinary Counsel,	:	ON CERTIFIED REPORT BY THE
Relator,	:	BOARD OF COMMISIONERS ON
-vs-	:	GRIEVANCES AND DISCIPLINE
Philip Q. Zauderer,	:	
	:	DD No. 83-19
Respondent.	:	
	:	ORDER

It appearing to the Court that, Louis C. Damiani, Secretary to the Board of Commissioners on Grievances and Discipline of the Bar, filed the Board's Final Report in this Court on July 20, 1983, recommending that the respondent, Philip Q. Zauderer be publicly reprimanded pursuant to Section 6(d) of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio; and it further appearing that respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this case was argued before the Court on December 6, 1983. On consideration thereof, it is ordered and adjudged by the Court that the Final Report of the Board of Commissioners on Grievances and Discipline be, and same hereby is, confirmed for the reasons set forth in the opinion rendered herein and this entry shall constitute the public reprimand provided, however, that should the respondent, Philip Q. Zauderer, be found guilty of subsequent misconduct, he shall be suspended for an indefinite period from the practice of law or permanently disbarred, depending upon the seriousness of such misconduct.

It is further ordered that the respondent, Philip Q. Zauderer, pay the costs of these proceedings taxed in the

amount of one thousand forty three dollars and sixty-three cents ($1,043.63) on or before May 4, 1984.

It is further ordered that the Clerk of this Court issue certified copies of this order as provided for in Section 20 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

APPROVED: /s/Frank D. Celebrezze

FRANK D. CELEBREZZE, Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from Journal 60.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 4th day of April, 1984.

JAMES WM. KELLY
CLERK
/s/ Joseph N. Rosenthal
DEPUTY

APPENDIX D

IN THE SUPREME COURT OF OHIO

Office of Disciplinary Counsel, Relator,	:	
—vs-	:	1983 Term
Philip Q. Zauderer	:	Case No. DD 83-19
Respondent.	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, that the above-named Respondent, Philip Q. Zauderer, hereby appeals to the Supreme Court of the United States from the judgment and final order of the Supreme Court of Ohio, entered and issued in this disciplinary proceeding on April 4, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ David K. Frank
DAVID K. FRANK
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Counsel for Respondent-
Appellant Philip Q. Zauderer

FILED
May 31, 1984
SUPREME COURT OF OHIO
James Wm. Kelly, Clerk

PROOF OF SERVICE

I, David K. Frank, attorney for Philip Q. Zauderer, Respondent-Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that all parties required to be served pursuant to Rule 28 of the Rules of the Supreme Court of the United States have been served, and that specifically, on May 31, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court Of The United States as follows:

1. Upon the Office of Disciplinary Counsel, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Angelo J. Gagliardo, Esq. and Mark H. Aultman, Esq., OFFICE OF DISCIPLINARY COUNSEL, 175 South Third Street, Columbus, Ohio 43215, attorneys of record for Relator-Appellee, Office of Disciplinary Counsel;
2. Upon all *amicus curiae* below by mailing a copy, in a duly addressed envelope, with first class postage prepaid to:

John W. Zeiger
Todd S. Swatsler
JONES, DAY, REAVIS & POGUE
50 West Broad St., Suite 400
Columbis, Ohio 43215
COUNSEL FOR *AMICUS CURIAE*

THE DISPATCH PRINTING COMPANY

Lita C. Miller
SCHWARTZ, SHAPIRO, KELM & WARREN
250 East Broad Street
Columbus, Ohio 43215

COUNSEL FOR *AMICUS CURIAE*
THE AMERICAN CIVIL LIBERTIES UNION
OF THE OHIO FOUNDATION, INC.

Paul R. Gingher
Daniel G. Hale
Malcolm L. Miller
GINGHER & CHRISTENSEN
311 East Broad Street
Columbus, Ohio 43215

COUNSEL FOR *AMICUS CURIAE*
THE OHIO NEWSPAPER ASSOCIATION

3. Upon the Honorable Anthony J. Celebrezze, Jr., Attorney General of Ohio, by mailing a copy to him in a duly addressed envelope, with first class postage prepaid, at his office at 30 East Broad Street, Columbus, Ohio 43215, since 28 U.S.C. § 2403(b) may be applicable.

/s/ David K. Frank

DAVID K. FRANK
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8787

Counsel for Respondent-
Appellant Philip Q. Zauderer

APPENDIX E

OHIO DISCIPLINARY RULES

DR 2-101 PUBLICITY.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;

(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

DR 2-103 RECOMMENDATION OF PROFESSIONAL EMPLOYMENT.

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a

non-lawyer who has not sought his adide regarding employment of a lawyer.

DR 2-104 SUGGESTION OF NEED OF LEGAL SERVICES.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept but shall not seek, employment from those contacted for the purpose of obtaining their joinder.